Supreme Court, U.S.
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No. 01-507

IN THE
SUPREME COURT OF THE UNITED STATES

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JOHN J. LEWIS ,

*Petitioner*,

v.

COUNTY OF ORANGE,

*Respondent*.

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ON PETITION FOR WRIT OF CERTIORARI TO THE FIFTH DISTRICT COURT OF APPEALS IN AND FOR THE STATE OF FLORIDA

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# REPLY TO RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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## REPLY TO RESPONSE TO PETITION FOR WRIT OF CERTIORARI

In this Reply Brief, the Respondent's Brief will be referred to as "RB-"]. Appellant will refer to the Respondent's Brief by page number and by approximate position on the page (eg., top ¶, middle ¶, third line, etc.) of the particular argument or point being addressed.

## STATEMENT OF THE CASE AND FACTS

Respondent begins by asserting that it gave notice that the home was unsafe and then claims, "Petitioner did not raise any challenge to the competency of any of the evidence submitted by Orange County." [RB-pg.1, first ¶]. Interestingly, Respondent can not identify anything contained within the notice provided to Petitioner which identifies, with particularity, the unsafe conditions which allegedly make the home unsafe. The notice provided to Petitioner contained nothing more than sweeping conclusions with general references to code provisions that are incapable of being addressed in a rational manner.

Respondent can not point to one single reference in any notice provided to Petitioner which identifies the personal property as being unsafe or subject to being seized. Nowhere in any of the notices does the Respondent identify either the personal property or one single unsafe condition capable of being addressed in a rational manner. This is why it so important that this Court render a definite ruling on whether the police power provides governmental agencies with the power to demolish and seize homes without prior judicial authorization. Respondent wishes to ignore the actual issue presented of whether an unlawful taking of a home, without judicial authorization, should compel the government to pay

just compensation under the Takings Clause of the Fifth Amendment.

Respondent claims, "He chose not to appeal the final order." [RB-pg.2, top of pg.]. As stated in the Petitioner's Petition for Writ of Certiorari filed in this Court, perhaps the reason Petitioner "chose not to appeal the final order" is because he was never provided any form of notice, either written or oral, that he had a right to appeal the Board's final order via a Petition for Writ of Certiorari to the circuit court within thirty days. In fact, Respondent provided a full page notice of Petitioner's rights regarding an appeal of the building official's decision to the Building Codes Board of Adjustment and Appeals, but provided no notice that Petitioner had a right to appeal the Board's final order. [Respondent's Appendix at pgs. 16-17; pgs 22-23].

It is important to understand that Petitioner was not represented by counsel throughout the administrative process and is inexperienced with appellate rules and procedure. Petitioner was unaware that he would be giving up very valuable rights if he failed to appeal the Board's final order because he was never provided any notice that he could appeal the Board's final order. Petitioner was denied an injunction because he did not appeal the Board's final order and thus because Petitioner failed to exhaust his administrative remedies.

It seems a bit unfair to claim that Petitioner "chose not to appeal the final order" when it is Respondent's own failure to provide notice which is reasonably calculated, under all the circumstances, to advise Petitioner of the pendency of the action and afford him a meaningful opportunity to present his objections. Clearly, a denial of due process occurred when the Respondent failed to provide any notice of Petitioner's appellate remedy beyond the Board's final order and then failed to seek judicial authorization prior to depriving Petitioner of the most protected property interest - his home.

Respondent claims, "After holding an evidentiary hearing, the circuit court entered an order denying Mr. Lewis' request for an injunction." [RB-pg.2, middle of pg.]. First, it is important to understand that the reason the court denied Petitioner injunctive relief, as a matter of law, is because the court found that he had adequate remedies at law for damages and because he had not exhausted his administrative remedies (i.e. - had not appealed the Board's final order).

Second, an emergency injunction hearing, without an opportunity to conduct discovery, only determines whether there is a substantial likelihood of success on the merits. A temporary injunction must be based on a showing of the following criteria: (1) a likelihood of irreparable harm, (2) no adequate remedy at law, (3) a substantial likelihood of success on the merits, and (4) a consideration of the public interest. *City of Jacksonville v. Naegele Outdoor Advertising Co.*, 634 So.2d 750, 752 (Fla. 1st DCA 1994).

Third, under well settled Florida case law, Petitioner could not get an injunction because he did not appeal the Board's final order and thus did not exhaust his administrative remedies. [Generally, where administrative remedies are available, it is improper to seek relief in the circuit court before those remedies are exhausted]. *See Schl. Bd. of Flagler County v. Hauser*, 293 So.2d 681 (Fla.1974); *Bankers Ins. Co. v. Fla. Residential Prop. & Cas. Joint Underwriting Ass'n*, 689 So.2d 1127, 1129 (Fla. 1st DCA 1997). However, doesn't it seem a bit unfair for the Respondent's agents to fail to provide any notice whatsoever of Petitioner's right to appeal the Board's final order and then come to Court and argue that he has no right to an injunction because he did not appeal the Board's final order.

Finally, the order denying Petitioner an injunction is void. The order is void as a matter of law because Petitioner served his Notice of Voluntary Dismissal prior to the order being entered. [Effect of voluntary dismissal is to completely

divest the trial court of jurisdiction to act subsequent to the dismissal]. *See Miller v. Fortune Ins. Co.*, 484 So.2d 1221, 1223-24 (Fla.1986); *Randle-Eastern Ambulance Serv., Inc. v. Vasta*, 360 So.2d 68, 68-69 (Fla.1978). As a result, the trial court lost jurisdiction to enter said order. The order so heavily relied upon by Respondent is void and should not be considered by this Court or any other Court.

Respondent claims, "On September 22, 1998, Orange County had the unsafe structure demolished in accordance with the prior notice to Plaintiff and with Orange County Code Section 9-811 and Standard Code Section 604. On November, 30, 1998, the County's Building Official notified Petitioner of the cost of demolishing the structure, and requesting reimbursement of the demolition cost (in the amount of $4,277.97)." [AB-pgs. 2-3, bottom of pg. 2, top of pg. 3]. In other words, not only did Petitioner's home and personal property get taken from him, but he also must pay to have his things stolen from him. Perhaps even more interesting is the fact that neither the Orange County Code or the Standard Unsafe Building Abatement Code provide for the Respondent's agents to obtain some form of judicial authorization, via an order of Court or a warrant, prior to demolishing and seizing a man's home and completely safe personal property.

## ARGUMENT

Apparently Respondent did not attempt in any way to argue in opposition to the issues actually presented in the Petition for Writ of Certiorari. The Respondent's brief is evasive and has failed to respond to the legal issues presented by Petitioner. Perhaps the very reason why Respondent alludes the actual issues is because it is difficult to argue that police power provides government agents with the authority to demolish and seize homes without judicial authorization. Respondent devoted portions of its brief to justify its agents

actions in not obtaining judicial authorization prior to demolishing and seizing Petitioner's home and personal property. The question presented is whether the Takings Clause of the Fifth Amendment requires just compensation be paid to the Petitioner for the unlawful taking of his home and personal property without judicial authorization when there were no exigent circumstances present which would justify the seizure and demolition without prior judicial authorization. Respondent has not responded to the question presented.

Respondent argues, "Petitioner took no appeal of the Board's final administrative order. Nor did Petitioner appeal the denial of the injunction in the circuit court action which he subsequently filed." [RB-pg. 9, last ¶]. Petitioner did not appeal the Board's final administrative order because he was not provided any notice whatsoever that he had a right to appeal the Board's final administrative order. Recently, this Court held that Social Security claimants need not exhaust issues in a request for review by the Appeals Council in order to preserve judicial review of those issues. *Sims v. Apfel*, 530 U.S. 103 (2000). In *Sims*, Justice O' Connor wrote a concurring opinion wherein she stated the following:

> I write separately because, in my view, **the agency's failure to notify claimants of an issue exhaustion requirement in this context is a sufficient basis for our decision.** [**e.s.**].

As in *Sims*, Respondent has failed to notify Petitioner of an administrative remedy exhaustion requirement. Looking at the Respondent's Appendix at pages 22 and 23, one can determine that the final administrative order provides no notice of any available appellate remedy beyond the Board's final administrative order. Even more interesting is the Respondent's Appendix at pages 16-17, which contains a full page of notice regarding the Petitioner's right to appeal the building official's decision to the Building Codes Board of Adjustment and Appeals, which merely rubber stamps the building official's

decision. Doesn't it seem reasonable that if Respondent felt it should provide notice of Petitioner's appellate remedy beyond the building official's decision, it should likewise provide notice of the Petitioner's appellate remedy beyond the Building Codes Board of Adjustment and Appeals. Lastly, it is important to remember that the injunction proceeding was voluntarily dismissed prior to the injunction order being entered. Thus, the order is void and there was never an opportunity to appeal a void order.

Respondent argues, "Petitioner seems to argue that delegation to administrative code enforcement boards is somehow legally unconstitutional but cites only to general references about warrantless searches and seizures. He does not challenge any of the individual procedures, notice and guidelines followed by Orange County under its code which enables it to carry out its police power when necessary to protect public health." [RB-pg. 11, top ¶]. In other words, who cares about the State and Federal Constitutions when the Orange County Code provides a means of demolishing, destroying and seizing homes without judicial authorization. Petitioner does argue that delegation of the power to destroy and seize a man's home of twenty (20) years and his personal property without some type of judicial authorization is legally unconstitutional when done pursuant to a warrantless and judicially unauthorized search and seizure.

Respondent claims, "The Fifth District Court of Appeals did address the issues relating to Petitioner's claim that some personal property was lost in the demolition of the structure demolished for public health issues." [RB-pg. 11, middle ¶]. Unlike the Fifth District Court of Appeals which actually addressed the personal property issue, the lower Court and the Respondent completely failed to mention or deal with the personal property issue at all. Somehow the burden was shifted to Petitioner to address an issue raised in the Complaint, but

never raised by the Respondent in its Motion for Summary Judgment.

Respondent states, "Petitioner cites *Camara v. Municipal Court of the City of San Fransisco,* 387 U.S. 523, 87 S. Ct. 1727, 18 L.Ed.2d 930 (1967) to support an argument that the County has improperly trespassed and seized property without a warrant. ... Since Petitioner never made any demand for a warrant, and raised this for the first time on the appeal, the holdings in *Camara* have no meaning to this petition." [RB-pg.15, top and bottom of first¶]. Actually, what Respondent should be arguing is that the holding in *Camara* has no meaning to Orange County and its agents. *Camara* sets forth the general rule that the determination of whether a government's agents may invade an area where an individual has a reasonable expectation of privacy is to be decided by a judicial officer, not a policeman or government agent.

When one of the highest expectation of privacy exists (in a home), the determination of whether that expectation of privacy can be invaded should be made by a judicial officer, not the Respondent's agents. Respondent seems to misunderstand the burden in stating that Petitioner was somehow supposed to demand a warrant. It is not Petitioner's duty to demand that a warrant be obtained, it is Respondent's duty to assure that its agents have complied with the State and Federal Constitutions prior to permanently intruding into Petitioner's reasonable expectation of privacy in his home.

Respondent states, "He cites to no code provision that must be considered unconstitutional for failing to afford due process but challenges the ability of Orange County to proceed with the execution of its police powers via the use of an Administrative Code Enforcement Board. According to Petitioner, a court must adjudicate every code violation to give such an order legal imprimatur. This would violate the separation of powers doctrine between the executive and judicial branches." [RB-pg.16 bottom of last ¶].

First, Petitioner would agree that an administrative code enforcement board is given certain police powers pursuant to the powers given the executive branch of government. However, Petitioner would respectfully disagree that the police power carries with it the right to demolish and seize homes and personal property without judicial authorization. Second, Petitioner would respectfully assert that an administrative code enforcement board crosses the line between quasi-judicial decision making and judicial decision making when it purports to authorize the seizure and demolition of a home. Pursuant to the greater level of protection afforded homes under our United States Constitution, only the judicial branch of government can decide when a person's home can be invaded, demolished and seized by government agents. Third, considering the greater level of protection afforded homes pursuant to the United States Constitution, Petitioner would respectfully assert that the Building Codes Board of Adjustment and Appeals violated the separation of powers doctrine by assuming the role of the judicial branch of government when it allegedly authorized the seizure and demolition of Petitioner's home.

Recently, this Court declined to accept the case of *Freeman v. City of Dallas*, 242 F.3d. 642 (5th Cir. 2001) (No. 00-1755) wherein the Fifth Circuit held that the warrantless seizure and demolition of vacant commercial apartment buildings did not violate the Fourth Amendment's reasonableness requirement. However, Petitioner respectfully asserts that the case at hand involves a home wherein a higher degree of protection is afforded under the Fourth Amendment's reasonableness requirement.

Even more recently, the Fifth Circuit ruled in *Washington Legal Foundation v. Texas Equal Access to Justice Foundation*, No. 00-50139 (October 15, 2001) that the Texas IOLTA program violates the Fifth Amendment prohibition on government's taking property without just compensation.

This Court recently accepted the case of *United States v. Dusenberry*, 2000 Fed App 0269P (6th Cir.), wherein the sixth circuit held that adequate notice was given despite Dusenberry's contention that he did not receive actual notice that his personal property was subject to forfeiture.

In the case at hand, it is undisputed that Respondent's agents seized and demolished Petitioner's home and personal property without judicial authorization in the form of a warrant or judicial order. It is disputed, however, that the Respondent's agents have legal authority to conduct a seizure and demolition of a home without judicial authorization. Petitioner respectfully asserts that Respondent's agents are without legal authority to seize, demolish and take Petitioner's home and personal property without judicial authorization.

The Respondent's failure to provide notice of Petitioner's available appellate remedy beyond the Board's final administrative order coupled with the Respondent's failure to obtain some form of judicial authorization prior to the destruction and seizure of Petitioner's home and property amounts to an unlawful taking. When government unlawfully takes a home and personal property, the Takings Clause of the Fifth Amendment should require just compensation be paid to the owner whose property has been unlawfully taken. The character of the government's action in the case at hand, acting outside the constitutional limits of its police power, amounts to an unlawful taking for which just compensation is due under the Fifth Amendment's Takings Clause.

Considering the significant privacy interests of the individual versus the competing public interests at stake and in view of the importance attached to the rights of home owners, Petitioner respectfully submits that this Court should render a definite ruling upon the question of whether the right to just compensation under the Takings Clause of the Fifth Amendment is applicable when a home is unlawfully taken without judicial authorization and when there are no exigent

circumstances present which would justify the failure to obtain such judicial authorization. Such a ruling is greatly needed in light of the developing trend of state and local governments to conduct seizures and demolitions of homes without judicial authorization.

## CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the opinion of the Fifth District Court of Appeals in the State of Florida.

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